United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

75-1208

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 75-1208

UNITED STATES OF AMERICA,

Appellee,

-against-

VINCENT PAPA,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING OR REHEARING EN BANC

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PETITION FOR REHEARING OR REHEARING EN BANC

On April 2, 1976, a panel of this Court* affirmed the conviction of Vincent Papa for conspiracy and two substantive violations of the federal narcotics laws, rejecting Papa's double jeopardy and due process claims. It is respectfully submitted that the panel's analysis of the double jeopardy issue leaves that area of the law in a state of confusion, and that the panel failed to apprehend the real issue in the due process context. Because of the importance of these issues, due to the frequency with which they arise in cases before this Court, the panel should rehear the case. In the alternative it is suggested that the Court rehear the case en banc.

*The panel consisted of Judges Hays, Feinberg and Friendly.

I. THE DOUBLE JEOPARDY ISSUE

In the course of its analysis of the double jeopardy issue, the panel recognized the broad and expansive view this Court has traditionally taken of large-scale narcotics conspiracies, and recited the litany of cases in which such conspiracies are likened to the structure of the far-flung legitimate business enterprises which they resemble. See, e.g., United Statesv. Agueci, 310 F.2d 817 (2d Cir. 1972); United States v. Bynum, 485 F.2d 490 (2d Cir. 1973); United States v. Tramunti, 513 F.2d 1087 (2d Cir. 1975); United States v. Sperling, 506 F.2d 1323 (2d Cir. 1974). The panel then noted, however, that this broad view was "not unbounded", a fact demonstrated in the two post-Sperling reversals, United States v. Miley, 513 F.2d 1191 (2d Cir. 1975), and United States v. Bertolotti, ____ F.2d ____, slip op. at 6409 (2d Cir. November 10, 1975). The panel went on to find that United States v. Mallah, 503 F. 2d 971 (2d Cir. 1974) had wrought a modification in the burden of proof in double jeopardy cases, but concluded that the evidence of distinctiveness in the instant case was "overwhelming".

But it is clear that nothing in Miley, Bertolotti, or any other case decided since Sperling in any way altered or undermined the basic rationale of the "vertically integrated loose-knit combination" doctrine announced in Bynum.

And United States v. Mallah, supra, stands for a far more significant proposition than merely that the burden of proof in cases such as the present one must be "modified".

The Agueci-Bynum-Sisca-Arroyo-Sperling line of cases stands clearly for the proposition that in large scale, hard narcotics cases, a single conspiracy will be found so long as the several "groups" within the conspiratorial framework were mutually dependent upon one another and assisted one another in the achievement of the common illicit purpose, and so long as each actor in the scheme had to have been aware that he was a part of a large venture, the overall success of which was dependent upon the activities of others occupying roles similar or identical to his, whether or not he was actually aware of the existence or identity of any other such individual. This Court has repeatedly advanced and supported this view of large drug conspiracies even in concededly marginal cases like Tramunti and Sperling, pointing out on at least one occasion:

> If a court does not bend over backward to blaze new pathways of individual nonresponsibility in hard drug cases, the result is not necessarily bad law.
>
> United States v. Tramunti, supra, at 1107, N.26.*

Nothing in Miley or Bertolotti did anything to alter or amend this position. Quite to the contrary, Miley

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*We respectfully submit that when, as in this case, an opinion of a panel of this Court, read in the light of the record, the briefs, and the arguments of counsel, intimates that the due process and double jeopardy clauses of the United States Constitution protect everyone except major figures in the drug trade, the result most certainly is bad law.

and Bertolotti were reversed because of the utter lack of a factual predicate upon which to invoke an analogy to the Agueci-Bynum-Arroyo-Sisca-Tramunti-Sperling line of decisions, and, indeed, in both cases, this Court reaffirmed its adherence to the stance it had adopted in the pre-Sperling cases, and made clear that that doctrine still applied to large-scale narcotics cases.

At the interface between the Agueci-Bynum line of authority and those cases espousing an exceedingly narrow view of conspiracy in the context of claims arising under the double jeopardy clause, see, e.g., United States v. McCall, 489 F.2d 359 (2d Cir. 1973), United States v. Nathan, 476 F.2d 456 (2d Cir. 1973), stands United States v. Mallah, 503 F.2d 971 (2d Cir. 1974). There, for the first time, this Court recognized that a due deference to considerations of simple fairness and constitutional integrity required that conspiracy be viewed in the same fashion without regard to whether the defendant claimed a Kotteakos or double jeopardy violation. The Court wrote:

> Neither has the classical distinction between simple chain and hub-spoke conspiracies held up well in the area of narcotics conspiracy, for where two or more chains are connected to a hub by core conspirators, this court has not hesitated to view the entirety as a single conspiracy.

> This view of the narcotics business cannot be confined to the context of the Kotteakos issue. The government cannot argue that the courts must take a broad view of the scope of a conspiracy for the purpose of Kotteakos and a narrow view for the purpose of answering the ultimate question in this double jeopardy claim: is the conspiracy below the same offense as that for which appellant [Pacelli] was convicted in [the first Pacelli case]?

United States v. Mallah, supra at 984-5.

The Court went on to say:

> In holding that the United States has not established that the conspiracy proved in [the first Pacelli case] and the conspiracy proved below are not one and the same, we would recall Justic Jackson's warning in Krulewitch v. United States....:
>
> This case illustrates a present drift in the federal law of conspiracy which warrants some further comment because it is characteristic of the long evolution of that elastic, sprawling and pervasive offense. Its history exemplifies the tendency of a principle to expand itself to the limit of its logic. The unavailing protest of courts...suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice.
>
> But given the broad definition of narcotics conspiracy adopted in our cases, and recognizing that the task of defining the scope of these conspiracies is somewhat akin to describing an elephant from touch, we concluded that appellant [Pacelli] has been convicted twice for the same offense.

Id. at 987. (Citations omitted; emphasis supplied.)

Accordingly, the facts of this case must be seen in light of Mallah and it incorporation of the "vertically integrated loose-knit combination doctrine into the law of double jeopardy.

Yet the panel here so construed Mallah as to eviscerate this underlying thrust. The panel distinguished Mallah on the ground that the first Pacelli case had failed to include anyone in the chain of distribution from Pacelli to his "foot soldiers", thus leading to the inference that those persons were identical to the co-conspirators named in Mallah. The panel here concluded that because the "chains" of the Soutern and Eastern District, Papa cases involved different "middle-level" or "wholesale" distributors, each constituted a separate conspiracy.

This, however, simply begs the question. The mere fact that the Eastern and Southern District indictments here named different "wholesalers" is a distinction without a difference. For each indictment here, as was the case in Mallah, included co-conspirators "to the grand jury unknown". To conclude, as did the panel, that each "chain" in the present case "had a full complement of personnel", assumes, rather than answers, the ultimate question here: whether those "unknown to the grand jury" in each case were in fact those identified by name in the other.

Certainly, in this connection, it cannot be too strongly emphasized that the existence of more than one distributional chain in an overall network has never dissuaded this court from finding a single conspiracy, so long as

> there existed "mutual dependence and assistance" among the spheres..., a common aim or purpose among the participants,... or a permissible inference, from the nature and scope of the operation, that each actor was aware of his part in a larger organization were others performed similar roles equally important to the success of the venture.
> United States v. Bertolotti, supra, at 6418. (Citations omitted.)

While any one of these factors is sufficient to warrant the conclusion of unity, the record in the present case reveals the presence of all of them. That there existed a common aim or purpose is clear beyond peradventure of doubt. The size of the Eastern and Southern District aspects of the overall operation was plainly such as to justify the inference, not available in cases such as Bertolotti and Miley, that those who dealt with Papa had to know that he was part of an organization of immense scale. Indeed, the participants in the scheme -- particularly, the wholesalers, Loria (Eastern District) and Euphemia, Stanzione and Loccoreiri (Southern Distrit) -- benefited from the fact that Papa was a large volume distributor, and thus each had a stake in Papa's continued viability in this role. The continuous flow in opposite directions of cash and narcotics to and from a large number of wholesalers enabled

Papa to be continuously able to meet the needs of each. All made themselves part of an enterprise which they surely knew was larger and more inclusive than Papa's separate transactions with each of them. See, especially, United States v. Bynum, supra. (Separate suppliers, unknown to one another, but dealing with a single wholesaling nexus, held to be part of a single overall conspiracy.)

Even beyond this, however, and further demonstrating "mutual dependence and assistance", was the role occupied by Anthony Passero.* The record unequivocally

*The obvious importance of the "Passero connection", minimized in the panel's opinion, gave rise the following colloquy during oral argument:

> JUDGE FRIENDLY: I don't have any doubt that the Government could have indicted Papa successfully in either District for both those conspiracies, both these activities as a single conspiracy.
>
> MR. BELLAR: I would say based on the record, Your Honor, that to have done so -- and I may be misreading comments in the Sperling case -- but to have done so in my opinion would have involved extension of simply multiconspiracy [dilemma].
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> JUDGE FRIENDLY: I am talking about Papa.
>
> MR. BELLAR: As I understand it, the Government theory would have been that there were two conspiracies.... The only link was Papa at the top.
>
> JUDGE FRIENDLY: There was also this Passero.... He was actually indicted in both.
>
> MR. BELLAR: No. Passero was not indicted in the Southern District....[O]n two occasions he appeared in Norman Young's office with Papa in connection with the washed money transaction. Passero's involvement with the money would be less than a single act....
>
> JUDGE FRIENDLY: How much money did he wash?
>
> MR. BELLAR: Passero, the evidence in the record that he appeared on two occasions with paper bags of money. I think Young's testimony was that on the average —
>
> JUDGE FRIENDLY: That doesn't sound like a single act.

(Oral argument was transcribed by a private court reporter service at the request of appellant's counsel. A copy of the relevant portion is annexed hereto.)

establishes that Pássero occupied an exalted position of trust vis-a-vis Papa in the Southern district case. Passero, there, was Vincent Papa's "bag man", a Papa "designee", in connection with the Westchester County money laundering aspect of the case. Passero, an un-indicted co-conspirator, obtained from Norman Young on a number of occasions, and on Papa's instructions, hundreds of thousands of dollars of Vincent Papa's freshly washed currency.

During 1970 and 1971, in the Eastern District case, as the grand jury testimony of Angelo Paradiso established--at or about the very time that Papa and Passero were washing allegedly Southern District millions in White Plains--both were supplying multikilogram quantities of narcotics to Anthony Loria* for distribution through the Eastern District network. Yet in spite of the significance which this Court has always attached to huge sums of money as the essential grease which lubricates the machinery of the narcotics trade, the panel here chose to sever off this aspect of the Southern District case.

*Anthony Loria, a co-defendant in the Eastern District Papa case, was also a co-conspirator, with Papa and Joseph DiNapoli, in United States v. Tramunti, supra; DiNapoli, in turn, was named as a co-conspirator below. The panel, however, chose to ignore the nexus among this case, the Eastern District Papa case, and Tramunti.

The opinion states:

> Papa argued before the jury that the money laundered by Young had nothing to do with the Southern District case. Thus, the only personnel link between the two conspiracies is tenuous at best.

Slip op at 2990.

While it is true that this Court must view the evidence in the light most favorable to the Government, this Court has never before announced that the evidence must be viewed in the light most favorable to the Government's position on the issues. It is, of course, hornbook law that what counsel argues to the jury is not evidence. Were the arguments of counsel relevant, however, the panel might just as well have noted that the Government vigorously argued--both to the District Court and the jury--that the Westchester money changing scheme had everything to do with the Southern District case.* It was upon the Government's argument that the Westchester millions, laundered for Papa and his Eastern District Partner, Anthony Passero, was part and parcel of the Southern District case that this aspect of the conspiracy was found relevant, and it was on this argument that the evidence of it went to the jury. It ill behooves this Court, at this stage of the proceedings, to legislate these crucial facts

*The Government's argument in this respect successfully overcame the Rule 29 motion of Vincent Papa, Jr., for a judgment of acquittal at the close of the case.

out of the case, and thus dispose of the double jeopardy issue.

II. Due Process

The panel, as had the District Court before it, misapprehended the nature and scope of the plea bargain which disposed of Vincent Papa's 1972 Eastern District cases, and, as a consequence, failed to address the principal issue raised through that aspect of the appeal.

As the panel correctly noted, "Papa's attorneys secured a promise from Druker [who was in charge of the 1972 prosecution of Papa] that there would be no additional prosecution stemming from matters...[then] under investigation in the Eastern District." Slip op. at 2995. Joseph Ragusa, upon whose testimony the case against Papa below principally revolved, had testified before an Eastern District Grand Jury in July, 1972, approximately a month before the Eastern District plea bargain was struck, and Druker was made aware of this fact prior to the entry of Papa's plea of guilty in September, 1972. Ragusa's testimony in the Eastern District was, in substance, identical to the testimony he gave at trial below. The bargain plainly embraced the Ragusa matter within its ambit.

The panel, however, failed to apprehend, we submit, that the 1972 agreement was between Vincent Papa and the United States Government, although negotiated and executed by agents on behalf of the respective parties. As the record established, Papa's principal concern was whether he would be subjected to a second prosecution based upon any investigation then pending in the Eastern District, not who would prosecute him. Accordingly, the issue here, contrary to the opinion of the panel, was very much "the breadth of the respect that principles of due process require one district of the United States Attorneys' Office to accord promises made by a Strike Force Attorney in another district". Slip op. Id.

Moreover, the panel based its determination of this matter in large part upon the fact that Ragusa was discovered by the Southern District through an independent investigation some years later. While the "Independent Source" doctrine is relevant in the context of certain Fourth Amendment claims, it is wholly irrelevent to the issue here. It is just the failure of "the left hand to know what the right is doing (or has done)" which gives rise to this kind of issue in the first place; such breakdowns in communication have never been held to dispose of the issue. Thus, the panel here failed to reach the heartof the matter.

CONCLUSION

THE PETITION FOR REHEARING SHOULD BE GRANTED: IN THE ALTERNATIVE, THE COURT SHOULD REHEAR THIS CASE EN BANC.

Respectfully submitted,

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Here we have in the Eastern District case four years' worth of narcotics activity with individuals going from the source, Vincent Papa, through middle level distributors, down to retailers and consumers. There was a full chain established from the Eastern District conspiracy record that that conspiracy was responsible for moving in excess of 100 kilos of heroin at a profit of millions of dollars. It is a free-standing independent on-going conspiracy.

The Souther District charge mentions individuals not mentioned in the Eastern District case and the principals were John Mooreland, Ragusa, et cetera, and that was itself a five-year free-standing conspiracy responsible for moving in excess of 400 kilos of heroin of a profit of millions and millions of dollars.

JUDGE FRIENDLY: I don't have any doubt that the Government could have indicted Papa successfully in either district for both those conspiracies, both these activities as a single conspiracy.

MR. BELLER: I would say based on the

record, Your Honor, that to have done so -- and I may be misreading comments in the Sperling case -- but to have done so in my opinion would have involved extension of simply a multi-conspiracy dogma.

JUDGE FRIENDLY: I am talking about Papa.

MR. BELLER: As I understand it, the Government theory would have been that there were two conspiracies unless they were shown in this record, other links between the two conspirators here. The only link was Papa at the top.

JUDGE FRIENDLY: There was also this Passero or somebody like that. He was actually indicted in both.

MR. BELLER: No. Passero was not indicted in the Southern District in this case at all.

Passero, the evidence in the record with regard to Passero in this conspiracy, on two occasions he appeared in Norman Young's office with Papa in connection with the washed money transaction. Passero's involvement with the money would be less than a single act. Rodriguez'

conviction was reversed on appeal, the single act --

JUDGE FRIENDLY: How much money did he wash?

MR. BELLER: Passero, the evidence in the record that he appeared on two occasions with paper bags of money, I think Young's testimony was that on the average --

JUDGE FRIENDLY: That doesn't sound like a single act.

MR. BELLER: Well, DiNapoli could have been a defendant in this case for his co-possession of a million dollars on February 3rd, 1972. That, the mere possession of that money, without anything else, I would doubt would be sufficient to make him go to the jury.

I would just point to Your Honor's decision in Miley where you suggested that that is a different circumstance, but you suggested at least in Miley that one should look to the agreement that each individual made with other people. And I believe Miley says with respect even to Brandt & Miley, Brandt & Miley certainly knew about all the activity in that conspiracy.

I think you said there was conspiracy between Brandt & Miley with the left-hand side and Brandt & Miley on the right-hand side. It may very well be that the suggestion was that they could only be prosecuted once but my reading of the case and Sperling is that each individual agreement can be prosecuted where there is no single conspiracy in this case, and the Government believed there was nothing other than the link of Papa at the top based on this record to connect the two branches of the conspiracy.

JUDGE FRIENDLY: It's very interesting and an important question. You have one fellow on the top of this and then you have all these branches off and it appears to me the Government could make up its mind, I suppose, largely on the strength of its evidence that the people at the ends of the branches could be successfully prosecuted in one conspiracy, and if they think the Government can bring them under one conspiracy charge and, if not, they could bring two, and there is the original question. I can see some merit to that, but I do have difficulty reconciling it with Mallah.

MR. BELLER: There is no question that